79-234

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

OLD NATIONAL BANK IN EVANSVILLE,
Personal Representative of the
Estate of Marjorie L. Viehe,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

OLD NATIONAL BANK IN EVANSVILLE,
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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Old National Bank in Evansville, as Personal Representative of the Estate of Marjorie L. Viehe, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 18, 1979, in its No. 78-2514.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported. Such opinion of the United States Court of Appeals for the Seventh Circuit affirmed a

decision of the United States District Court for the Southern District of Indiana, Evansville Division, granting the Motion to Dismiss of Defendant-Appellee, United States of America, and entering judgment thereon, on September 25, 1978. A copy of the opinion of the United States Court of Appeals for the Seventh Circuit appears in the Appendix, and a copy of the decision and judgment of the United States District Court for the Southern District of Indiana, Evansville Division, appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 18, 1979, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). Jurisdiction in the United States District Court for the Southern District of Indiana, Evansville Division, was invoked under 28 U.S.C. § 1346 (a) and 26 U.S.C. § 7422 (a). Jurisdiction in the United States Court of Appeals for the Seventh Circuit was invoked under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. When does the limitations period for filing a claim for refund under 26 U.S.C. § 6511 (a) begin to run?

2. What constitutes payment within the meaning of such statute?

United States Code, Title 26, Section 6511 (a). Period of limitation on filing claim. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

United States Code, Title 26, Section 7422 (b). Protest or duress. - Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

STATEMENT OF THE CASE

This action was commenced by the Old National Bank in Evansville, as Personal Representative of the Estate of Marjorie L. Viehe, Plaintiff-Appellant, with the filing of its Complaint on March 27, 1978.

Marjorie Viehe died on October 8, 1971, and a Federal Estate Tax Return was properly filed on July 7, 1972, together with a check for payment of tax as computed in the return. Subsequently, in February, 1973, the estate filed a first refund claim, which was allowed, and which is not related to this action.

Marjorie Viehe's husband, Robert, had predeceased her by one month. On or about February 1, 1974, the Personal Representative discovered that certain overdrafts in Robert's inter vivos trust had not been taken into account in computing the value of his estate for either Indiana Inheritance or Federal Estate tax purposes.

Both federal and state refund claims based on these overdrafts were ultimately granted (the state refund was received on June 20, 1975). Most of Robert's estate had been transferred to his beneficiary, Marjorie's estate. The adjustments to the value of the portion of the Robert Viehe estate which was transferred to Marjorie's estate caused a reduction in value of Marjorie's estate as well, giving rise to the claim which is the subject of this action, filed on July 29, 1975.

The date of assessment of the Federal Estate Tax in Marjorie Viehe's Estate is not of record in this action.

REASONS FOR GRANTING THE WRIT

I.

The Judgment of the Court of Appeals is Contrary to the Decision of this Court in *Rosenman v. United States*, 323 U.S. 658 (1945).

This action was decided by the Trial Court upon a Motion to Dismiss. Upon such a Motion, all matters pleaded in the Complaint must be taken as true, and such Motion may not be granted unless it appears to a certainty that there can exist no set of facts which Plaintiff could prove which would entitle it to relief, *Orphan v. Furnco Const. Corp.*, (CA 7, 1972) 466 F.2d 795.

The date of the assessment of Petitioner's Federal Estate Tax is not of record in this action. The Trial Court afforded Petitioner no opportunity to either discover or prove such date. In doing so, and in granting the United States' Motion to Dismiss, the Trial Court necessarily concluded that such date is immaterial to the action before the Court. In thus concluding, the Trial Court failed to follow, and its Decision is in conflict with, the unanimous decision of this Court in *Rosenman v. United States*, 323 U.S. 658 (1945). In affirming the Trial Court, the United States Court of Appeals for the Seventh Circuit committed the same error.

The Trial Court further committed error in seeking to distinguish *Rosenman* from the instant action upon the basis of the absence herein of a letter of protest. Although it is true that such a letter was included with the transfer of funds to the Department of the Treasury by the Rosenman Estate, there is now a statute, 26 U.S.C. § 7422 (b), which completely obviates the necessity of such a letter. As this was the sole point upon which the Trial Court sought to distinguish *Rosenman*, a point which the Seventh Circuit failed to even acknowledge, the Trial Court committed additional error.

A close reading of *Rosenman* reveals that the Seventh Circuit did not even understand the facts of the *Rosenman*

case. The Seventh Circuit, in assuming that the "second claim" filed by the Rosenman Estate in 1940, for moneys, $14,219.78 of which was delivered to the Department of the Treasury on December 24, 1934, was an "Amended Claim," dating arguably to the date of the earlier 1938 claim - which it was not - demonstrated its lack of understanding of the facts in *Rosenman*.

All of the necessary facts of the *Rosenman* case can be found in Mr. Justice Frankfurter's opinion for this Court. However, a reading of the opinion of the Court of Claims in *Rosenman v. United States*, 101 Ct. Cl. 437, 53 F. Supp. 722 (1944), makes the facts, and particularly the chronology, much more clear, particularly the fact that the sole points in issue after the Court of Claims' decision were whether or not the Rosenman Estate could try to recover both on its first claim filed more than three years after the delivery of the first $120,000.00 and also upon its second claim filed May 20, 1940, asking for $14,219.78 out of the $80,224.24 shown to be due on the taxpayer's own Federal Estate Tax Return. Almost one-third of this second and additional claim for tax refund was based upon a claim by decedent's son, Martin Rosenman, against the Rosenman Estate, the potential existence of which was known by the Executors before they filed their Federal Estate Tax Return on February 25, 1935, but which was not liquidated in amount until some time thereafter and first incorporated into a claim for refund on May 20, 1940. No one, not even the Treasury Department, even contested the Rosenman Estate's right to claim refund of the $10,497.34 paid on April 22, 1938, a fact which may not have been crystal clear to the District Court below.

The *Rosenman* case is, in all material respects, directly on point in the action now before the Court. In *Rosenman*, the Court held that the Statute of Limitations[1] does not begin to run until the taxpayer's liability has been fixed, in this case by

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[1] The relevant Statute of Limitations in *Rosenman*, Section 810 of the Revenue Act of 1932, required a claim be filed within three years after payment.

the audit of the return and the subsequent "assessment" of the tax. The Seventh Circuit in the instant action sought to inject a new concept into the rule of the *Rosenman* case - that of "tentative assessment" based upon filing of the return. The Seventh Circuit then cites *Rosenman* as authority for such a concept. However, the return in *Rosenman*, which was filed *after* the transfer of funds to the Department of the Treasury, was filed on February 25, 1935. The relevant claim for refund, which was truly a "second" claim and not an "amended" claim, a point not grasped by the Seventh Circuit, was filed on May 20, 1945, well over five years after the filing of the return, under a three-year Statute of Limitations. Such fact renders the conclusion that the filing of the return, even after a transfer of funds, is the date which commences the running of the limitations period an impossibility. Yet the Seventh Circuit in the instant action found just that - that the limitations period begins to run upon the filing of a return along with the transfer of funds. The only two conceivable conclusions are that the Seventh Circuit failed to understand *Rosenman*, or that the Seventh Circuit refuses to follow *Rosenman*. In either event, the Seventh Circuit erred, and its decision should be reviewed, and reversed, by this Court.

In *Rosenman*, this Court quite correctly held that the term "payment" in the statute is a term of art and effectively means the crediting of funds submitted to the taxpayer's tax account by means of an "assessment," being the action which fixes the Department of the Treasury's assertion of taxpayer's liability. The act of "assessment," when coupled with a transfer of funds, begins the running of the limitations period under that portion of the statute which, on its face, begins at the time of payment - both at the time of *Rosenman* and now. After noting that it is the time of assessment, not the time of the filing of the return or the transfer of funds, at which interest begins to accrue in favor of the taxpayer in the event of an overpayment, this Court in *Rosenman* supported its decision that such date of final assessment begins the running of the Statute of Limitations for a claim for refund stating that, "It will not do to treat the same transaction as payment and

not as payment, whichever favors the Government."

In *Thomas v. Mercantile National Bank at Dallas*, 204 F. 2d 943 (CA 5, 1953), *Roseman* was correctly so read by the Fifth Circuit. *Thomas* is a decision from which the United States, and the Department of the Treasury took no appeal.

Petitioner is aware that for some time this Court has declined many tax cases, perhaps in deference to the "expertise" of the taxing departments of the Department of the Treasury. However, it is Petitioner's position that seldom has the United States so flagrantly flouted the authority of this Court, or so carelessly misinterpreted the decisions of this Court as it has here, perhaps seeking refuge in the knowledge that this Court seldom accepts tax cases. Admittedly, the amount of money here involved is not large, but Petitioner feels the question is valid, and is concerned about the attitude of the United States, which appears to have infected the Seventh Circuit as evidenced by that Court's flippant remark that the Rosenman Estate's transfer of funds on December 24, 1934, was "not in the spirit of the season." Petitioner assumes that Court takes comfort in its order that its decision not be published or cited.

As previously indicated, on a Motion to Dismiss, all matters pleaded in the Complaint must be taken as true, and for such Motion to be granted, there can exist no set of facts which Plaintiff can prove which would entitle it to relief. As the United States admitted in its brief to the Seventh Circuit, the date of assessment in the action now before the Court is not of record, and Petitioner was given no opportunity to discover of prove such fact. This Court, in *Rosenman*, established that such date is crucial to determination of the running of the limitations period. As previously indicated, the existence of 26 U.S.C. § 7422 (b) renders untenable the Trial Court's position that *Rosenman* can be distinguished on the basis of the absence of a protest letter in the instant action.

Upon diligent search, Petitioner has been unable to locate a single decision of any court which has held, since the enactment of 26 U.S.C. § 7422 (b), that transfer of funds, with or without a return, accompanied by a letter of protest, gives the

taxpayer who delivers same any rights greater or different than the rights of those who do not send such a letter. Interestingly, the Trial Court and the United States have failed to point out any such decision. It would appear to be the purpose of such statute to eliminate the need for such meaningless acts. Petitioner is of the opinion that it is important to note that this is the sole basis upon which the Trial Court even *sought* to distinguish *Rosenman*. Such distinction being absolutely pointless in view of 26 U.S.C. § 7422 (b), Petitioner is at a loss to explain the Trial Court's action, or to explain the failure of the Seventh Circuit to address this portion of the Trial Court's action.

Perhaps the most disturbing aspect of the Trial Court's action in distinguishing *Rosenman* solely upon the absence hereof a protest letter lies in the potential impact of this entire litigation. The language of the Trial Court's decision has found its way into the taxation press, and the progress of this litigation is being watched by at least one tax service. Denial of the Writ here requested would result in the perception of the public that this Court has approved the requirement of the Trial Court that a protest letter is required to preserve the taxpayer's rights under *Rosenman*, and in spite of 26 U.S.C. § 7422 (b), every prudent taxpayer will be well advised to tender funds "under protest," and to accompany every remittance with an out-moded, and statutorily unnecessary protest letter.

The existence of the intervening Seventh Circuit decision, to which the requested Writ would be addressed, is of no assistance in alleviating this problem for two reasons. As the Seventh Circuit has forbidden publication of its decision, the public can only assume that its affirmance of the Trial Court has approved the Trial Court's meaningless requirement. But even if the Seventh Circuit's decision were published, its failure to refute the Trial Court's position would be perceived as tacit approval, still requiring prudent taxpayers to flood the Department of the Treasury with protest letters.

The only way the decision in the instant action can stand is for *Rosenman* to have been overruled by the United States District Court for the Southern District of Indiana or by the

Seventh Circuit. Although each has apparently tried to do so, neither has the authority to do so. This Court's holding in *Rosenman* is still the law, and it should be applied in the instant action. The only way for that to happen is for this Court to issue a Writ of Certiorari, and review and reverse the decision of the Seventh Circuit in this action.

II.

There is a Conflict Between Circuits as to the Proper Interpretation of 26 U.S.C. § 6511.

Section 6511 (a) of Title 26 provides, in part, that its two-year Statute of Limitations begins to run at the time the tax is "paid." The proper meaning of "payment" as contemplated by this statute has been the topic of a number of decisions of United States District Courts and Courts of Appeal, as well as this Court's *Rosenman v. United States*, 323 U.S. 658 (1945). These decisions have consistently held that a tax cannot be "paid" until an amount of tax exists which can be paid, so that "payment" as used in 28 U.S.C. § 6511 (a) does not mean a mere transfer of funds to the Government by a person or entity potentially subject to a tax. Rather, some form of assessment is required before there can be a "payment" within the meaning of that statute. The point at which such tax liability comes into being, so that there can be a "payment" within the meaning of this statute, is one of the issues now before the Court.

In *Thomas v. Mercantile National Bank*, 204 F. 2d 943 (5th Cir. 1953), the Fifth Circuit decided that the Statute of Limitations, then three years, did not begin to run until the amount of an overpayment became ascertainable. This construction is consistent with traditional construction of Statutes of Limitations providing that such limitations periods do not begin to run until the cause of action accrues and is reasonably discoverable by the person in whose favor such cause of action exists. In this regard, it is important to remember that we are dealing in this action with two distinct entities, the estate of

Robert Viehe and the estate of Marjorie L. Viehe. When the overdrafts in the estate of Robert Viehe were discovered, on or about February 1, 1974, there resulted a decrease in the amount payable from the estate of Robert Viehe to the estate of Marjorie L. Viehe, the estate of Marjorie L. Viehe being the primary beneficiary under the estate of Robert Viehe. As a result, although the facts supporting the claim for refund based upon the overdraft in Robert Viehe's estate may have been reasonably discoverable by Robert Viehe's estate immediately upon Robert Viehe's death, the facts underlying the claim for refund of the estate of Marjorie L. Viehe, based upon the reduced amount to be received from the estate of Robert Viehe could not have been discovered, and, indeed, did not exist, prior to the actual discovery of those facts, i.e., the discovery of the overdrafts in Robert Viehe's account on or about February 1, 1974, or until the State of Indiana subsequently thereto approved the reduction in the distribution from the Robert Viehe Estate to the Marjorie L. Viehe Estate (represented by Petitioner).

As a result, we are here confronted with a fact situation substantially similar to that confronted by the Fifth Circuit in *Thomas v. Mercantile National Bank*, supra, wherein that Court stated that the Statute of Limitations did not begin to run until the amount of the overpayment became ascertainable.

The gist of *Thomas* is that "payment" does not occur until the latter of the transfer of funds and assessment of the tax. The Seventh Circuit, in the instant action, applied a rule completely opposite from that stated by the Fifth Circuit in *Thomas*, by refusing to decide that the two-year Statute of Limitations began to run on or about February 1, 1974, or on the date of assessment of the tax (which date is unknown to Petitioner), but rather decided that the Statute began to run on the date of the filing of the return, July 7, 1972. The rule adopted by the Seventh Circuit in this action not only directly conflicts with the rule adopted by the Fifth Circuit in *Thomas*, supra, but also imposes an oppressive burden upon taxpayers. The Seventh Circuit rule establishes the result that the limitations period of 26 U.S.C. § 6511 (a) can begin to run

long before the taxpayer knows, or has any reasonable basis to know, that grounds for the claim so limited even exist.

As argued by the United States of America in its Brief before the United States Court of Appeals for the Seventh Circuit, and as acknowledged by the Seventh Circuit in its opinion rendered herein, one purpose of the Statute of Limitations is to insert an element of finality into actions by the United States of America and other potential defendants. However, finality is not the only goal which is relevant to the determination of the Statute of Limitations. Statutes of Limitations generally, including the limitations period imposed by 26 U.S.C. § 6511 (a), also establish a reasonable time after a cause of action accrues, and after the person in whose favor such cause of action runs has a reasonable opportunity to discover the existence of such cause of action, in which the person in possession of such potential cause of action may evaluate the merits of such claim and attempt to resolve it prior to having such cause of action cut off by the running of the statutory period. To hold, as did the Seventh Circuit in this action, that such period begins to run before such cause of action exists, or the nature of such cause of action can reasonably be determined, is contrary to the purpose of establishing a reasonable time in which to bring a cause of action, as defined by the statutory limitations period, and conflicts with the decision of the Fifth Circuit in *Thomas v. Mercantile National Bank*, supra.

The Government in its Brief and Oral Argument in the Court of Appeals, as well as the Court of Appeals itself in its decision in this action, went to great lengths to state that the construction of the Statute of Limitations contained at 26 U.S.C. § 6511 (a) whereby such limitations period begins to run at the date of formal assessment rather than at the date of the filing of the return or transfer of funds, is cumbersome and should not be applied. Determination of the date of final assessment of the tax is no more difficult to discern than is the date of the filing of the return or the transfer of funds. That being as it may, such argument of the Government and the position of the Court of Appeals is neither relevant nor appro-

priate. In spite of such arguments, this Court held in *Rosenman* that the limitations period begins to run at the time of assessment, not the time of the filing of the return, and such holding remains the law until changed by this Court. The concern of the Government and the Court of Appeals that such a rule is for some reason improper is simply immaterial in view of the holding of this Court in *Rosenman* that such rule is the law.

The Fifth Circuit in *Thomas* recognized that such was the holding of *Rosenman* in determining that "payment" within the meaning of 26 U.S.C. § 6511 (a) does not, and cannot, occur prior to the date of assessment. In deciding that it is the date of the filing of the return, and not the date of assessment, which, together with the transfer of funds, constitutes "payment" and commences the running of the limitations period, the Seventh Circuit finds itself in conflict, not only with the decision of this Court in *Rosenman*, but also with the Fifth Circuit in *Thomas*. The Department of the Treasury did not seek review of the decision of the Fifth Circuit in *Thomas*.

CONCLUSION

Each of the reasons herein set forth constitutes a sufficient basis for the issuance of a Writ of Certiorari to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 18, 1979

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 78-2514	) Appeal from the
OLD NATIONAL BANK IN EVANSVILLE,	) United States
Personal Representative of the	) District Court
Estate of Marjorie L. Viehe,	) for the Southern
Plaintiff-Appellant,	) District of
vs.	) Indiana, Evans-
UNITED STATES OF AMERICA,	) ville Division
Defendant-Appellee.	) No. EV 78-48-C

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED: April 16, 1979

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

May 18, 1979

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

OLD NATIONAL BANK IN EVANSVILLE,	) Appeal from the
Personal Representative of the	) United States
Estate of Marjorie L. Viehe,	) District Court
Plaintiff-Appellant,	) for the Southern
	) District of
No. 78-2514 vs.	) Indiana, Evans-
	) ville Division.
UNITED STATES OF AMERICA,	) No. EV 78 C 48
Defendant-Appellee.	) S. Hugh Dillin,
	) *Judge*

ORDER

Plaintiff appeals from a judgment of the district court which denied the plaintiff's tax refund claim on the ground that the refund claim had not been timely filed. We agree and affirm.

I

Plaintiff is the estate of Marjorie Viehe who died on

October 8, 1971. Marjorie Viehe's husband had predeceased her by one month. As a result, her estate included property acquired from his estate. On February 1, 1974, it was discovered that certain overdrafts by Robert Viehe had not been taken into account, resulting in an overvaluation of his estate and, consequently, of Marjorie Viehe's estate. Robert's estate filed claims for both state and federal estate tax refunds. On June 20, 1975, Robert's estate received a state tax refund in the amount of $508. On July 29, 1975, Marjorie's estate filed a refund claim.

The plaintiff's request for a refund was denied because the refund claim was filed more than three years after the estate tax return had originally been filed, on July 7, 1972. The plaintiff then instituted the present action. The administrator of the estate did not argue before the district court that this untimely filing was the result of excusable neglect. Instead, the administrator urges that the statute of limitations on refund claims began running no earlier than the time the overdrafts were discovered, and thus the administrator urges that his claim was timely filed. The district court rejected this construction of the statute, as do we.

II

No refund suit may be maintained unless a timely refund claim has been filed with the IRS. 26 U.S.C. § 7422 (a). The provision which defines the time limitations for filing a claim provides:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later . . . .

26 U.S.C. § 6511 (a). This statute, in the clearest and simplest

of terms, requires that Marjorie Viehe's claim have been filed before July 8, 1975, three years after filing (payment having been remitted with the filing).

To avoid this result, the administrator urges that the "time the tax was paid," which actuates the two-year period, is the time at which the cause of action underlying the claim accrues. That time, he argues, was at the earliest February 1974 when the overdrafts were discovered. Under this theory the July 1975 filing would be timely. This claim is based on plaintiff's reading of *Rosenman v. United States*, 323 U.S. 658 (1945).

Rosenman involved the construction of a predecesor statute to the one under consideration here. That statute permitted only refund claims made within "three years . . . after payment." 323 U.S. at 659. In *Rosenman*, payment was due on Christmas of 1934. On Christmas Eve, 1934, the estate delivered a check for $120,000 to the IRS, not in the spirit of the season but rather "under protest and duress, and solely for the purpose of avoiding penalties and interest." The IRS had extended the filing deadline to February 25, 1935, and on that date the estate filed a return showing approximately $80,000 in taxes due from the estate. One month later, the IRS advised the estate that the reported amount due had been applied from the $120,000 tendered in satisfaction of the estate's liability. Three years later, in March, 1938, the estate filed a refund claim for the remaining balance. After that, the audit of the estate was completed, and the IRS determined that a net tax of $128,759.08 was due. In April, 1938, the estate tendered the balance due. Shortly thereafter the IRS rejected the March refund claim. On May 20, 1940, the estate filed a refund claim for $24,717.12 based on additional, previously unclaimed deductions. The IRS rejected the portion of this claim in excess of the amount paid in April, 1938, on the ground that the $120,000 payment had been made more than three years before the claim.

The Supreme Court held that the refund claim was not barred by the statute of limitations. The Court considered both the date on which the IRS applied $80,000 of the $120,000 refund to the plaintiff's tax liability and the date on which the plaintiff tendered the deficiency payment for tax in excess of $120,000 as dates of payment. The court rejected the government's contention that the original payment of $120,000 was the date of payment which triggered the three-year period:

> [O]n December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until April 1938 [the date on which the audit was completed and the deficiency tendered].

323 U.S. at 662.

Rosenman does not supply the controlling principles for this case. In *Rosenman* the original payment was made *before* the return was even filed; and, when it was filed, the government's application of a portion of the pre-payment was deemed by the Court to be a payment within the terms of the limitation provision. In this case, however, the original payment was instead a payment "to discharge what he [the taxpayer] deemed to be a tax liability" and was not made before either the government or the taxpayer had asserted the amount believed to be due. Thus, *Rosenman* supplies no reason to characterize the original payment in anyway that would avoid the application of the limitations provision.[1]

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[1] There is substantial authority for the proposition that when the taxpayer files a return showing an amount of taxes due and accompanies it with a remittance for that amount, payment within the meaning of section 6511 has taken place. *See Ameel v. United States*, 426 F. 2d 1270 (6th Cir. 1970); *Lewyt Corp. v. Commissioner*, 215 F. 2d 518 (2d Cir. 1954); *Charles Leich & Co. v. United States*, 329 F. 2d 649 (Ct. Cl. 1964).

The plaintiff attempts to avoid this reading of *Rosenman* by urging that its holding merely represents a specific application of the general principle that statutes of limitations only begin to run when the cause of action has accrued. That, plaintiff argues, was the time of assessment in *Rosenman* and in this case would be either the time at which the check overdrafts were discovered or the time at which the IRS formally assessed the estate's tax liability. We note initially that his general principle is clearly contrary to the language of the statue itself. The statutory time limitation clearly represents an attempt by Congress to minimize the administrative burdens imposed by permitting refund claims. Congress must necessarily have contemplated that some refunds, based on subsequently discovered facts, would be left unpaid. Acceptance of plaintiff's strained construction, allowing refund claims filed within three years of the accrual of the cause of action, would impose the very burdens Congress sought to avoid. This interpretation would permit refund claims for an indefinite period after the taxpayer's remittance whenever new information relating to the taxpayer's estate surfaced.[2]

Plaintiff's construction is also at odds with the relevant

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[2] It is because of the clear conflict of such an interpretation with the language and evident purpose of the limitations provision that we do not believe that the Supreme Court's statement that not until assessment "was there such a claim as could start the time running . . ." should be read as importing a cause of action interpretation into the statute. 323 U.S. at 661.

case law.[3] In *Kreiger v. United States*, 539 F. 2d 317 (3d Cir. 1976), the plaintiffs had invested in and received payments from, a firm later revealed to be nothing but a "vast 'Ponzi Scheme.' " Upon discovering the true nature of the firm's operation, the taxpayer-plaintiff sought to recharacterize the tax treatment of the payments from the firm, treating them as a tax-free return of principal instead of earned interest. The claim was denied as untimely, and the court of appeals upheld this denial, despite the timing of the discovery of the firm's fraudulent practices, noting, "a rule by which a tax refund claimant could always escape summary dismissal for untimeliness by pleading a scenario of third-party concealment . . . would be an unreasonable burden upon orderly administrative function." *Id.* at 322. This principle has even been applied in the more compelling situation where the government participates in concealing the overpayments from the taxpayer. *Bryan v. United States*, 99 F.2d 549 (10th Cir. 1938), *cert. denied*, 305 U.S. 611 (1939). Certainly these situations would present a more persuasive case for applying equitable principles to overcome the limitations statute's policy of easing adminis-

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[3] Plaintiff's citation of *Waldken v. United States*, 255 F. 2d 681 (6th Cir. 1958), *cert. denied*, 378 U.S. 825 (1958), to support the position that the statute commences to run with the accrual of the cause of action is unpersuasive. In *Waldken*, the refund claim was based on a subsequent court determination that a will other than the one which served as the basis for the estate tax return was the valid final will. The Court, however, noted that the claim was time barred even if the admission of the second will to probate was the date actuating the limitations period, and thus any of its statements with regard to the beginning of the period are dicta. Furthermore, the decision does not support the cause of action principal urged by the plaintiff since the cause of action did not accrue until the second will was determined to be the valid, final will - a date after its admission to probate.

strative burdens than the instant case where no such concealment is even alleged. *See also United States v. Zacks*, 375 U.S. 59 (1963) (refund claim resulting from Congressional retroactive change in tax treatment of patent royalties barred by statute of limitations). We are therefore reluctant to find any principle so clearly contrary to the manifest intent of Congress and the relevant case law embodied in *Rosenman*.

Rosenman, we believe, can be explained within the terms of the statute and without recourse to the broader principle urged by the taxpayer. The ordinary meaning of "payment" of a liability, for taxes or otherwise, does not encompass transfers of money into escrow or "suspense" accounts pending a determination of ultimate liability. Indeed, there can be no payment of tax within the meaning of the statute until the tax itself is at least tentatively determined. Thus, the *Rosenman* opinion made it clear that such transfers were not payments of tax: "The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, *payments in escrow*." 323 U.S. at 662 (emphasis supplied).

Plaintiff claims that such a reading of "payment" is unsatisfactory because it makes the determination of whether payment occurred depend on the intent of the taxpayer, a result which would reward the litigious and recalcitrant taxpayer and penalize the willing taxpayer. Plaintiff also claims that determining the intent of the taxpayer is difficult and provides an unworkable standard. On the contrary, this interpretation of payment does not at all depend on the intent of the taxpayer. Instead, in the instances of payments with a filed return, payment occurs at filing; and in the instances of prepayment before a filed return, payment occurs at assessment from the prepaid deposit. This is the case regardless whether the taxpayer "intends" these payments to be final

or not.[4]

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4 *See United States v. Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956) upholding the district court's conclusion that;

> [I]n the case of a proper tax return, the return itself defines the obligation, but where a taxpayer makes a transfer of money to the collector, the transfer itself does not define the tax obligation. Some further act is necessary.

Id. at 459.

> Another type of case - those in which an amount is remitted with a filed return and the government later asserts a proposed deficiency in the amount shown due on the return - should be noted. In such a case the taxpayer may often forward the deficiency amount to avoid interest and penalties even though the deficiency has not been finalized by an audit and an assessment certified by the IRS. Such remittances, like remittances before filing, are made in advance of the determination of an uncertain liability and thus are not payments of a tax liability. *See Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953):
>
> > Until the Commissioner certified the assessment . . . there was no deficiency assessment, and no liability on the part of the taxpayer, and consequently nothing to pay. The sum deposited . . . was merely an advance deposit to cover additional tax liability expected to arise thereafter.

Id. at 944. Thus, this third class of cases involve amounts to be determined later, as opposed to cases such as the instant one where the amount shown on the return is presumed to be a final amount owing.

We must conclude that the statute requires us to consider the plaintiff's remittance with his tax return as payment actuating the limitation period. Even if the statute permits the courts to imply some equitable doctrines, the application of the statute in this case results in no inequities.[5] The administrator discovered the overdrafts in February, 1974, more than one year before the deadline for filing refund claims. Even were we to accept the taxpayer's dubious argument that his claim for a refund on Marjorie's estate could not be asserted until the *state* paid refunds to Robert's estate based on the overdraft, that would still have left more than two weeks in which to file

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5 It is for this reason that several of the cases cited by plaintiff as supportive of its interpretation of the statute are unpersuasive. In *Reeves v. United States*, 154 F. Supp. 673 (W.D. Pa. 1957), the diminution of the estate giving rise to the refund claim was based on the government's assertion of additional income taxes owed by the estate. Thus; as the court pointed out, delay in filing the estate tax refund was the "fault" of the government in delaying its assertion of the estate's income tax deficiencies and thus it would have been unjust to apply the limitations period. No such inequity appears in this case. *Bankers Trust Co. v. United States*, 438 F.2d 1046 (2d Cir. 1971), and *Duncan v. United States*, 148 F.Supp. 264 (D. Mass. 1957) both involve claims based upon deductions for attorney's fees incurred by an estate in contesting a tax deficiency. Just as in *Reeves*, these claims resulted from the government's actions in asserting the deficiency and not from the later discovery of grounds for a return. This government involvement obviously alters the equities.

the claims.[6] Thus, the estate had ample opportunity in this case to file its claims.

AFFIRMED.

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[6] In *Kreiger v. United States*, 539 F.2d 317 (3d Cir. 1976), discussed in note 2 *supra*, the court denied the refund claim in a situation similar to, if not more difficult than, the case before us. The court also noted that the result was not inequitable since the estate still had more than a year to file the claim after the time they could have discovered the basis of the claim by reasonable diligence. *Id.* at 322.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

OLD NATIONAL BANK IN EVANSVILLE, Personal Representative of the Estate of Marjorie L. Viehe,	)	
Plaintiff,	)	
-vs-	)	NO. EV 78-48-C
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OF DECISION

Background

Plaintiff is the personal representative of the Estate of Marjorie L. Viehe (decedent). The cause is before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction. Defendant pleads the statute of limitations.

The complaint is for refund of estate tax paid. Decedent died on October 8, 1971, and a federal estate tax return was properly filed on July 7, 1972. A check for payment of tax then due was enclosed with the return. Plaintiff later filed for a refund based on a revaluation of decedent's interest in a particular trust. "New facts" had made the revaluation necessary. The Internal Revenue Service granted the refund on February 27, 1974. Plaintiff filed a second claim for refund based on yet another valuation of the same interest, precipitated by the discovery of more "new facts." Paragraph IV of the complaint. By way of explaining these revaluations, plain-

tiff alleges that the trust in question was a marital trust which was settled by decedent's husband, and which inured to decedent shortly before her death. The value of this trust, it is alleged, was incapable of determination until just before the second claim for refund was filed.

Discussion

The merits of plaintiff's claim are not in issue. The sole and dispositive question is whether the complaint is to be dismissed because the statute of limitations has tolled.

The language of the rule, found in 29 U.S.C. § 6511 (a), is clear. Claim for credit or refund must be made within

> ". . . 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later . . ."

The return was filed and the tax paid on July 7, 1972. Exhibits A and B to defendant's brief. The claim here in dispute was made on July 29, 1975. More than three years had elapsed.

Plaintiff argues and cites cases for the proposition that the running of the statute did not start with the 1972 filing and payment. The first of these cases is Rosenman v. United States, 323 U.S. 658, 89 L.Ed. 535 (1945). The executors in that case paid the Internal Revenue Service $120,000 on December 24, 1935. The payment was accompanied by a letter of transmittal which made it clear that the payment was under protest and to avoid penalties and interest. 89 L.Ed. at 538. In April, 1938, a deficiency was assessed by the Commissioner of Internal Revenue which gave rise to the claim for refund. At 539. The claim for refund was filed on May 20, 1940. The Court held that the $120,000 did not constitute a payment which would set the statute running, but called it "merely a 'deposit' and not a 'payment' . . ." At 540. The statute, therefore, did not begin to run until the deficiency was assessed, and the executors were therefore not barred.

No such caveat of contingency accompanied the plaintiff's original payment in this case. The letter states that the check was "in payment" of the tax liability as calculated at that time. Exhibit B to defendant's brief. Moreover, in *Rosenman* the government was not permitted to interpose the statute of limitations when the cause of action grew out of a later deficiency assessment, initiated *by* the government. In the instant case, no subsequent extra liability has been asserted by the government; in fact a refund to plaintiff has already been made. Plaintiff is therefore not aided by *Rosenman*.

The other cases cited by plaintiff are equally unsupportive. Reeves v. United States, 154 F.Supp. 673 (W.D. Pa. 1957), involved a deficiency assessment by the Commissioner several months after the original payment by the taxpayer. The statute was held to begin to run at the time the deficiency assessment was made. Duncan v. United States dealt with similar circumstances. 148 F.Supp. 264 (D. Mass. 1957).

Walker v. United States, 255 F.2d 681 (6 Cir. 1958), cert. den. 378 U.S. 825, stands for the proposition that the statute begins to run upon estate tax payment pursuant to a first will when the first will is eventually superseded by a second will. The case is of no help to plaintiff. Schmidt v. C.I.R., 272 F.2d 423 (9 Cir. 1959), involved, as did *Rosenman*, a contingent payment in the nature of a deposit.

Sufficient reason has not been shown to permit the plaintiff to elude the plain language of 29 U.S.C. § 6511. Under the section taxpayers are permitted a specific period of time in which to refine their positions with respect to tax liability and to appeal to the Commissioner for adjustment of past transactions. The cases discussed *supra* indicate that the time period may be extended if the Commissioner asserts additional liability on the part of the taxpayer at a time after the act or acts which initially triggered the running of the statute. To hold otherwise would be absurd and unfair. Plaintiff had three years in which to revise its position. It did so once within the time period, but was three weeks late with the second attempt.

Statutes of limitations do not exist simply to force plaintiffs to hurry. They are designed to allow aggrieved persons

a reasonable amount of time in which to invoke the legal process for the redress of the harm which has befallen them. A chief reason that any limit at all is imposed is that potential defendants ought not to be required to live out their days in fear that an old cause of action will suddenly descend upon them. Repose, after a fair period, is manifestly just. In the case of the federal revenue system, this principle acquires a different cast. The assessment and collection of federal taxes is itself an undertaking of enormous expense. Orderly and efficient operation of the taxing mechanism requires a time after which the government can put a file to rest. Taxpayers themselves benefit from similar limitations.

These rules are unquestionably hard-edged. If they are to have meaning, however, they are to be enforced in the absence of circumstances which compel a contrary result. The Court is not persuaded that such circumstances exist in this case.

For the foregoing reasons the complaint will be dismissed. Judgment will be entered accordingly.

Dated this 25th day of September, 1978.

S / S. Hugh Dillin

S. Hugh Dillin, Judge

Copies to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

OLD NATIONAL BANK IN EVANSVILLE, Personal Representative of the Estate of Marjorie L. Viehe,	)	
Plaintiff,	)	
-vs-	)	NO. EV 78-48-C
UNITED STATES OF AMERICA,	)	
Defendant.	)	

JUDGMENT

The Court having this day filed its Memorandum of Decision in the above matter in the following words and figures: (H. I.), now therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by its complaint and said complaint is hereby dismissed.

Dated this 25th day of September, 1978.

S / S. Hugh Dillin,

S. Hugh Dillin, Judge

Copies to:

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